

Task Force on Ethics Rules
Governing the State Attorney General, County Attorneys, and Other Public Lawyers
State Courts Building, Phoenix
Meeting Minutes: March 31, 2022

Members attending: Hon. William Montgomery (Chair), Michael Bailey, Karen Emerson, Terry Goddard, Jeffrey Kros, Mary O’Grady, Steve Peru, Sheila Polk, Patricia Sallen, Hon. Christopher Staring, Maret Vessella

Guests: Lisa Hauser, Jim Lee, Joe Domanico, *Paul Li, Kelly Flood, Alicia Moffatt, *Marretta Mathes, José Cardenas, David Byers

AOC Staff: Mark Meltzer, Sabrina Nash, *Theresa Barrett

*indicates virtual attendance

1. Call to Order; welcoming remarks; introductions. The Chair called the first meeting of the Task Force on Ethics Rules Governing the State Attorney General, County Attorneys, and Other Public Lawyers (“Task Force”) to order at 10:00 a.m. The Chair expressed his appreciation to Task Force members for their participation in this endeavor, for reviewing voluminous written materials before today’s meeting, and for attending this first meeting in person.

The Chair advised that Task Force meetings are public meetings. He explained that the public is welcome to attend these meetings, and that a majority of Task Force members may discuss and decide Task Force recommendations only at duly noticed public meetings. The public may offer comments at each meeting following a call to the public. Members generally don’t discuss public comments at the time they are made, but a public comment might result in an item being added to a future Task Force meeting agenda. The Chair briefly summarized the materials that staff provided for today’s meeting; he suggested that members retain today’s spiral-bound printed packets for future reference. He then invited members and guests to introduce themselves.

Following the introductions, the Chair emphasized the desirability of stakeholder input. He asked members to suggest the names of government lawyers and their clients who are interested in addressing the Task Force and presenting their views to the members. See further the roadmap discussion in section 5 of these minutes.

2. Review of Administrative Order No. 2022-22; Rules for Conducting Task Force Business. The Chair reviewed A.O. No. 2022-22, which established this Task Force and appointed its members. The Order says in part that “if the Task Force determines that changes to the ethics rules are necessary, [it shall] recommend amendments.” The

Chair observed that this directive also allows the Task Force to recommend amendments to the comments to those rules. The Administrative Order requires the Task Force to submit and present its report to the Arizona Judicial Council by December 2022. The Chair added that Task Force recommendations should address amendments to the ethical rules in Supreme Court Rule 42 rather than propose statutory changes.

The Chair advised that Mr. Scott Rhodes, who was appointed as a member of the Task Force, voluntarily resigned before today's meeting due to a potential conflict of interest. The Chair has nonetheless requested that Mr. Rhodes appear at a future Task Force meeting to present his views on the issues at hand.

The meeting materials included a single page of proposed Rules for Conducting Task Force Business. The document addresses the quorum that is required for conducting business, Task Force decision-making, a proxy policy, and the necessity of a call to the public at each meeting. With regard to the meetings being open to the public, a member advised that he had recently been contacted by media about the Task Force and asked whether he could respond to future media inquiries. The Chair responded that he could, or he could refer the media to the Court's public information officer, Mr. Alberto Rodriguez. If the member has specific concerns about the Task Force, however, the member was requested to contact the Chair. At this point, a member made the following motion:

Motion: To approve the Rules for Conducting Task Force Business. The motion received a second and it passed unanimously. **ETF-001**

3. Presentation by Lisa Hauser. The Chair then invited Lisa Hauser to address the Task Force. Ms. Hauser is deputy counsel for the Administrative Office of the Courts ("AOC"). Before joining the AOC, she worked for the Arizona Attorney General, where she represented the Secretary of State and executive branch agencies. She later worked directly for the Department of Gaming and for the Governor, as well as in private practice. She presented today on the origin of the Governor's Office of Legal Counsel, which was established in 1995 by the enactment of A.R.S. § 41-192(E).

Prior to this 1995 statutory amendment, relations between the Governor and the Attorney General had become strained, particularly regarding Indian gaming issues. Under then-existing law, however, the Attorney General served as the Governor's legal counsel, and notwithstanding the tense relationship between these officials, the Governor had no alternative counsel to provide him with independent legal advice. The impasse was compounded by the lack of clarity in the ethics rules for government lawyers concerning these types of situations. The Governor's solution for resolving the impasse

was to propose a statutory amendment in Title 41, and today's meeting materials contain extensive documentation of the history of that bill, SB 1401. The bill became law, and the Governor was thereby authorized to establish an office of independent counsel separate and apart from the Attorney General.

Ms. Hauser shared several of her personal views. She believes that disagreements among government officials, such as the one that erupted in 1995 and an official's -- in that case, the Governor's -- accompanying need for independent counsel, cannot be routinely resolved by statutory amendments. Instead, the ethical rules should clarify the role of government lawyers and guide them in dealing with conflicts of interest. The legislators' discussions of SB 1401 omitted mention of lawyers' ethical rules. The Legislature's issue was whether it should establish a new executive office -- for the purpose of allowing the Governor to obtain independent legal advice -- and it was characterized as a political matter rather than a matter of attorney ethics.

Ms. Hauser also observed that government lawyers must distinguish between policy, where there frequently are differences of political opinion, and legal advice concerning the requirements of the law. When she joined the Governor's Office of Legal Counsel, she helped navigate the line between legal advice and policy matters by reporting her legal advice directly to the Governor, not to the Governor's Chief of Staff. This avoided staff filtering her legal advice to the Governor based on policy and political considerations. She suggested that the line between law and policy is not always distinct or apparent, and drawing it often depends on the particular circumstances. She noted the importance of government attorneys having the support and trust of the elected and appointed officials they are assigned to advise and represent. Ms. Hauser concluded by suggesting that Task Force members clarify the ethics rules for government attorneys, including ethics rules that address their unique public roles, identification of their clients, their distinct conflicts of interest, and circumstances when a government entity or official is entitled to outside counsel.

The Chair thanked Ms. Hauser for her presentation, which led to a general discussion of the issues before the Task Force.

4. General discussion of the issues before the Task Force. The Chair began the general discussion by observing that the duties of the Attorney General and county attorneys are prescribed by law. Their powers are not inherent or determined by the common law. He also suggested as a general principle that any amendments to the ethics rules that the Task Force proposes also take into consideration the expectations of the clients of government lawyers.

Ms. Hauser had provided members with a copy of the Attorney General Ethics Manual, which was promulgated in 1990. The manual contains a complete set of the then-existing ethics rules, with an “Attorney General Discussion” after the text of many rules. The introduction to the manual noted that these “discussions” were drafted to assist assistant attorney generals and paralegals “in identifying and dealing with the situations in which the rules apply to the government practice of this office in a unique or different manner than would occur in a nongovernmental setting.” Members agreed that the manual was quite instructive for the Task Force, although they observed that it is more than thirty years old, and portions might be outdated.

Members also observed that the current ethics rules were written primarily for attorneys in private practice. There are occasional references in the current rules and comments to government attorneys, but those references are rather general and provide little if any contemporary guidance. One member noted that few legislators are members of the Bar, and they might not appreciate potential ethical issues and conflicts of interest that are unknowingly embedded in proposed legislation. Several members stressed the need for government attorneys to be mindful of the identity of their clients, and that government attorneys should promptly meet with newly elected and appointed officials to reinforce who they represent.

One member suggested that the pertinent inquiry is not “who is a client?” but is rather “what is a client?” Another member opined that it might be easy to say that a government lawyer represents the people of a county or state. Counties and the state have a variety of sub-divisions, however, each of which is created by statute or the constitution and each of which might have its own legal advisor. Accordingly, there might be different levels of what one member referred to as “clientness” and what another member distinguished as jural entities.

If each political subdivision, such as an administrative department or risk management, has statutorily enumerated powers or duties, does each become a client under the ethical rules? When there are multiple layers in an executive department of government, who has the authority on issues such as filing court documents, settling cases, or proceeding with an appeal? A government attorney must distinguish between those who are interested government officials, and those who have actual authority in the matter at hand. What should occur when co-equal elected officials, who might share the same legal advisor, have opposing positions; or when an elected official disagrees on a legal issue with a chief executive or a board of supervisors, yet the same government attorney represents them all? Who, or what, is the government lawyer’s client in these circumstances? Members agreed that the landscape is complex. The focus of the Task Force might be narrow, but it is deep.

Members also discussed application of the ethics rules not just to elected or appointed attorneys, but also to line staff. While elected and appointed attorneys might have a political orientation, members noted the importance of line attorneys continuing to exercise independent ethical judgment. Members also discussed the need for government lawyers to create ethical screens within their offices, for example, when one office has brought a criminal complaint as well as a civil forfeiture proceeding or a civil commitment petition against the same individual arising from identical facts. Other conflicts might arise, such as a conflict between a duty to advise and a duty to approve, or when an enforcement action against another government entity might be necessary. Ethical issues also might arise that are specific to part-time government attorneys, including part-time government attorneys in small communities. Members noted that there are occasionally differences between what the rules say, and the way things are actually done. Members considered the desirability of ethics training for all government attorneys.

One member had a nuanced view of Ms. Hauser's presentation. The member believed that the controversy in 1995, and similar ones, should not be considered as harmful but rather are "baked into our constitutional system" and reveal tensions that are inherent and might be expected. The member also opined that the use of outside counsel might be necessary, but the use of outside counsel can also be abused, and the reality of funding is often a consideration whenever a governmental entity or official requests public authorization to hire a private attorney.

5. Roadmap. As noted above, the Task Force report is due in December, and if members convene monthly between now and then, they can have about eight meetings. The Chair proposed meeting on the last Thursday of each month, but that schedule is tentative and subject to adjustment based on the members' availability and the work that remains to be done. Members may use a proxy, but each of the members brings special expertise to the table and the Chair requested that members use proxies judiciously. Members will probably need at least two meetings at the end of the year to finalize their report and recommendations. Meanwhile, the next couple Task Force meetings should focus on fact gathering. Members agreed on Thursday, April 28, as the date for the next Task Force meeting.

On the matter of fact gathering, the Chair encouraged members to communicate with staff about which stakeholders might provide beneficial input. The input could come from government attorneys as well as their clients, and from those who are elected or appointed and from those who are deputies, assistants, or line staff members. The stakeholders could come from any level of government – state, county, or municipal – or

from any government institution, and from large entities as well as smaller or rural ones. The stakeholders should share their experiences, issues, and concerns that arise under the current ethical rules. Members also should contemplate what other or more specific topics they would like these stakeholders to address during their presentations. After the stakeholder presentations, members will consider the ethical rules sequentially, beginning with the preamble.

6. Call to the public; adjourn. No one orally responded to the Chair's call to the public. St. John's Chief of Police Lance Spivey, however, provided a written comment to the Chair, which the Chair reviewed with the members.

The meeting adjourned at 11:57 a.m.